The Appellate Court said in its opinion, quoting from page 2 of the opinion:

> "The rule is that a judgment and commitment may properly be affirmed if supported by a valid conviction upon one count notwithstanding the fact that a like sentence was improperly imposed upon another count if the sentences are of equal length and are to be served concurrently. . *Manisia v. United States,* 296 P. 2d 871 (CCA 8); *Green v. United States,* 358 U.S. 326; *United States v. Sheridan,* 329 U.S. 379; *Hirabayashi v. United States,* 320, U.S. 81."

The Court of Appeals took cognizance of the legal question and main contention of petitioner and after making the following statement on page 2, quote:

> "The main contention of Defendant Cottage is that, as a matter of law, he could not be found guilty of both stealing the whiskey and receiving the whiskey and that therefore the sentences on counts 1 and 2 against him should be reversed. It is also contended on behalf of both defendants that because there was joint action on their part in stealing the whiskey, as charged in Count 1, they could not be convicted of conspiracy under Count 3.
>
> "We find no merit in this contention with regard to the validity of the conviction under Count 3. The conviction being valid, we are of the opinion that it makes no difference whether the convictions under Counts 1 and 2 are good or bad, since the sentences imposed on Defendant Cottage were made concurrent and were of equal length."

It was the contention of the petitioner that the Court should have granted him a new trial, based on Justice Stewart's opinion in *Milanovitch v. U. S.,* 365 U.S. 551, 5 L. Ed. 2nd 773, in which Justice Stewart said it was not enough to set aside the sentence on one of the counts.

The Court said:

> "It is now contended that setting aside the sentence on the receiving count was not enough—that the conviction on the larceny count must also be reversed, and the case remanded for a new trial. The argument is that although the evidence was sufficient to support a conviction for either larceny or receiving, the judge should have instructed the jury that a guilty verdict could be returned upon either count but not both. It is urged that since it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed, a new trial is in order. This was the view of Chief Judge Sobeloff, dissenting in the Court of Appeals. 275 F. 2d at 721."

Judge Sobeloff in the Fourth Circuit decision, *supra*, (which was referred to in the Supreme Court decision with approval), said:

> "To summarize: Just as it is not for judges but for the jury, where a jury trial has been prayed, to find a verdict of guilty, however plain the case may appear to be, so judges may not assume to choose between alternatives available to the jury. Judges may not do so even for the laudable purpose of preventing the possibility of error on the jury's part.
>
> Likewise, if guilt is pronounced on two counts where, under proper instructions, conviction could be permitted on only one, neither the district judge nor the appellate judges may take it upon themselves to speculate which count the twelve jurors would have unanimously picked if they had been correctly instructed. Virginia Milanovich was entitled to have the choice made under proper instructions by the jury before whom she elected to be tried; without this, she may not be deprived of her liberty.

> "Since we cannot be certain what the jury would have decided if not erroneously charged, the doubt must be resolved in her favor. Either she should be given the benefit of the lesser sentence, or a new trial should be awarded."

Also see *Gebardi v. U. S.*, 287 U.S. 112.

In the *Gebardi Case, supra,* the Court said:

> "Where it is impossible under any circumstances to commit a substantive offense without co-operative action, the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under the Federal Statute punishing conspiracy to violate a law of the United States."

See also *In re Vickers,* 371 Mich. 114, in which the Court said:

> "Abortion involves consent of action between two persons, the perpetrator and the victim, the immediate effect of consummation reaching only the participants, as also in respect to adultery, bigamy, incest, or dueling, in which a charge of conspiracy to commit the offense will not lie against the 2 participants. This is because the conspiracy to commit them is in such close connection with the objective offense as to be inseparable from them."

In *Balman v. U. S.,* 94 F. 2nd 197, in deciding a case where an objection was made to a trial Court's charge on "burden of proof," the Appeal Court said:

> "We feel it to be important that no precedent should be indulged which may probably lead to laxity of statement so important in criminal proceedings."

Appellant feels that the attitude of the Court in the *Balman case, supra,* in preventing the creation of a questionable precedent, could be adopted in this case in view of the settled principles of law that were overlooked, and not considered here.

It is emphasized that the appellant petitioner should not suffer because of the omissions of either the Trial Court, defense counsel or Government counsel.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

GEORGE S. FITZGERALD and
PAUL B. MAYRAND,
Counsel for Petitioner,
1714 Guardian Building,
Detroit, Michigan 48226.

IN THE

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE J. COTTAGE and KEITH DARWIN FRANCISCO, *Defendants-Appellants.*	On APPEAL from the District Court of the United States for the Eastern District of Michigan Southern Division.

Decided December 30, 1965.

OPINION

Before: MILLER* and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PER CURIAM. The defendants-appellants, Cottage and Francisco, were charged in Count 1 of the indictment with stealing a truckload of whiskey moving in interstate commerce. The same two defendants were also charged in the third count of the indictment with the offense of conspiring with others to steal a truckload of whiskey moving in interstate commerce. The defendant Cottage, but not the defendant Francisco, was also charged in the second count of the indictment with receiving a truckload of whiskey

* The late Judge Shackleford Miller presided at the hearing of this case, but did not participate in this opinion.

stolen while moving in interstate commerce. The jury found the defendant Cottage guilty on the first and third counts of the indictment. Defendant Cottage received a sentence of three years on each of the three counts, to run concurrently. Defendant Francisco received a sentence of five years on each count, to run concurrently.

The main contention of the defendant Cottage is that, as a matter of law, he could not be found guilty of both stealing the whiskey and receiving the whiskey, and that therefore the sentences on Counts 1 and 2 against him should be reversed. It is also contended on behalf of both defendants that, because there was joint action on their part in stealing the whiskey, as charged in Count 1, they could not also be convicted of conspiracy under Count 3.

We find no merit in this contention with regard to the validity of the conviction under Count 3. That conviction being valid, we are of the opinion that it makes no difference whether the convictions under Counts 1 and 2 are good or bad, since the sentences imposed on defendant Cottage were made concurrent and were of equal length; and the sentences imposed on Francisco were also made concurrent and were of equal length. The rule is that a judgment of commitment may properly be affirmed if supported by a valid conviction upon one count, notwithstanding the fact that a like sentence was improperly imposed upon another count, if the sentences are of equal length and to be served concurrently. *Masinia v. United States,* 296 F.2d 871 (C.A. 8); *Greene v. United States,* 358 U.S. 326; *United States v. Sheridan,* 329 U.S. 379; *Hirabayashi v. United States,* 320 U.S. 81.

In accordance with the foregoing the judgments are affirmed.

ORDER DENYING PETITION FOR REHEARING

(Filed January 25, 1966)

Before: MILLER* and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

The above cause coming on to be heard on appellant's petition for rehearing, and the Court being duly advised:

Now, therefore, it is Ordered, Adjudged and Decreed that the petition for rehearing be and is hereby denied.

Entered by Order of the Court,

/s/ Carl W. Reuss,
Clerk.

*The late Judge Shackelford Miller presided at the hearing of this case, but did not participate in this order.